

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
Petition for Waiver Of Warner Chilcott	)	
Corporation	)	CG Docket No. 02-278
	)	
	)	CG Docket No. 05-338
	)	

**REPLY OF WARNER CHILCOTT CORPORATION IN SUPPORT OF ITS  
PETITION FOR RETROACTIVE WAIVER**

Warner Chilcott Corporation (“Warner Chilcott”) respectfully submits the following reply to a comment filed in opposition to its Petition for Retroactive Waiver (the “Petition”) by TCPA Plaintiffs (“Plaintiffs”), Saint Louise Heart Center, Inc. and Shaun Fauley.<sup>1</sup> Warner Chilcott’s Petition requests a retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules, 47 C.F.R. § 64.1200(a)(4)(iv) (the “Regulation” or “Opt-out Requirement”) with respect to facsimiles advertising sent with the recipients’ prior express invitation or permission before April 30, 2015.<sup>2</sup>

The Commission has already rejected each argument raised in opposition to the instant Petition. First, the Commission and the Consumer and Governmental Affairs Bureau (the “Bureau”) have conclusively determined that the Commission has sufficient authority to grant the waiver; indeed, arguments identical to those raised by Plaintiffs in this regard have been rejected in each of the Commission’s prior Orders.<sup>3</sup> Second, the Bureau has explicitly refused to

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<sup>1</sup> Comments of Saint Louis Health Ctr., Inc., CG Dkt. Nos., 02-278, 05-338 (“TCPA Plaintiffs’ Comments”).

<sup>2</sup> Petition for Retroactive Waiver by Warner Chilcott, Corporation, CG Dkt. Nos. 02-278, 05-338 (“Petition”).

<sup>3</sup> *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 FCC Rcd 13998 (Oct. 30, 2014)(“Original Waiver Order”); *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 8598 (Aug. 28, 2015)(“Second Waiver Order”); *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 14057 (Dec. 9, 2015)(“Third Waiver Order”).

deny petitions on the basis that they were filed after April 30, 2015.<sup>4</sup> In fact, it has already resolved, on two separate occasions, that petitioners similarly situated to Warner Chilcott are entitled to waivers of the opt-out requirement for faxes sent prior to the compliance date of April 30, 2015, *regardless* of whether their Petition was filed by April 30, 2015.<sup>5</sup> Thus, Warner Chilcott's Petition is timely as it seeks a waiver for faxes sent prior to April 30, 2015, only.<sup>6</sup>

Warner Chilcott's Petition meets the two requirements for waiver: it is similarly situated to the original waiver recipients and its requested waiver is supported by good cause.<sup>7</sup> Warner Chilcott is similarly situated original waiver recipients as it was affected by industry-wide confusion resulting from the Junk Fax Order, the subject faxes were sent prior to April 30, 2015 and it has asserted that the subject faxes were sent with prior express consent.<sup>8</sup> Its Petition is supported by the same good cause and, similarly, furthers the public interest.<sup>9</sup> For these reasons, Warner Chilcott respectfully requests that the Bureau grant its request for a retroactive waiver of Section 64.1200(a)(4)(iv) to the extent that it applies to any faxes transmitted by Warner Chilcott (or on its behalf) with the prior express permission of the recipients or their agents.

## **I. THE COMMISSION AND BUREAU HAVE AUTHORITY TO GRANT THE REQUESTED RETROACTIVE WAIVER.**

The Commission and Bureau have consistently held that the Commission is authorized to waive the Regulation for the "good cause shown."<sup>10</sup> Specifically, "good cause" exists because

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<sup>4</sup> Third Waiver Order at ¶ 18.

<sup>5</sup> Second Waiver Order at ¶ 20; Third Waiver Order at ¶ 18.

<sup>6</sup> *Id.*

<sup>7</sup> Original Waiver Order at ¶¶ 22-27; Third Waiver Order Third Waiver Order at ¶ 13

<sup>8</sup> Third Waiver Order Third Waiver Order at ¶ 13, n.55, *compare* Petition at pps. 2, 6.

<sup>9</sup> Original Waiver Order at ¶¶ 22-27.

<sup>10</sup> *Id.* at ¶ 21; Second Waiver Order at ¶ 13; Third Waiver Order at ¶ 12.

due to confusion created by the inconsistency between a footnote in the Junk Fax Order and the Opt-out requirement, combined with potentially insufficient notice, waiver of the Regulation for faxes sent before April 30, 2015 is in the public interest.<sup>11</sup> Plaintiffs make no new arguments to contradict this conclusion, but merely incorporate by reference arguments that the Commission and Bureau have already rejected expressly.<sup>12</sup> These arguments should be rejected once again.

## **II. WARNER CHILCOTT IS SIMILARLY SITUATED TO THE ORIGINAL PETITIONERS AND THE SAME GOOD CAUSE JUSTIFIES ITS PETITION.**

The Commission has already determined that parties “similarly situated” to Warner Chilcott are entitled to waiver of the Regulation based on “good cause.”<sup>13</sup> On these same grounds, Warner Chilcott’s Petition should also be granted.

First, Warner Chilcott is similarly situated to petitioners to whom the Commission and Bureau have already granted waivers.<sup>14</sup> Like the prior successful petitioners, Warner Chilcott was adversely impacted by the “industry-wide confusion resulting from the Junk Fax Order footnote and the Rule.”<sup>15</sup> Moreover, Warner Chilcott has also asserted that the subject faxes “were sent with the prior express consent or permission of the recipients.”<sup>16</sup> Thus, like the prior waiver recipients—including those who filed well after April 30, 2015 –Warner Chilcott ha[s] “adequately demonstrated that [it] [is] similarly situated.”<sup>17</sup>

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<sup>11</sup> Original Waiver Order at ¶¶ 24-27.

<sup>12</sup> TCPA Plaintiffs’ Comments at p. 4.

<sup>13</sup> Original Waiver Order at ¶¶ 22, 28, 30; Second Waiver Order at ¶¶ 12-16; Third Waiver Order at ¶¶ 12-15.

<sup>14</sup> Second Waiver Order at ¶ 20; Third Waiver Order at ¶ 13, n 55.

<sup>15</sup> Third Waiver Order at ¶ 13, n.55, *compare* Petition at p. 6.

<sup>16</sup> Third Waiver Order at ¶ 13, n. 55, *compare* Petition at p. 2.

<sup>17</sup> Third Waiver Order at ¶ 13.

Second, the same “good cause” recognized by the Commission as warranting deviation from the Regulation exists with regard to this Petitioner. Initially, the special circumstances detailed in the Order counsel in favor of waiver in its case.<sup>18</sup> Specifically, the “confusing situation” following the Junk Fax Order—caused by the inconsistent footnote and lack of explicit notice—left Warner Chilcott with “no legal certainty that an opt-out notice is required for solicited faxes.”<sup>19</sup> Further, the public interest and fairness favor waiving the Regulation as to Warner Chilcott. Unlike those similarly situated parties who have already received waivers, without the waiver, Warner Chilcott could still face the potential for substantial liability or costs for alleged violations arising out of reasonable confusion and lack of legal certainty. Granting Warner Chilcott’s Petition, and waiving the Regulation in its case, will ensure just and equal treatment.

### **III. WARNER CHILCOTT’S PETITION IS TIMELY.**

The Bureau has been clear: it will not “reject petitions solely on the basis that they were filed after April 30, 2015.”<sup>20</sup> Although it initially encouraged petitioners to make every effort to file by April 30, 2015, that date is a deadline for *compliance* with the Regulation, it is not a formal *filing* deadline and has not been treated as such.<sup>21</sup>

Thus, the Bureau has granted petitions filed after April 30, 2015. It explained that granting such waivers “for faxes sent prior to the April 30, 2015 deadline imposed by the 2014 *Anda Commission Order* for compliance...does not contradict the purpose or intent of the initial

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<sup>18</sup> Petition at pps. 6-8.

<sup>19</sup> *Id.* at 6; Original Waiver Order at ¶ 13.

<sup>20</sup> Third Waiver Order at ¶ 18.

<sup>21</sup> Original Waiver Order at ¶ 30; Third Waiver Order at ¶ 18.

waiver order as the parties involved are similarly situated to the original waiver recipients.”<sup>22</sup> Here, like the parties who have received waivers based on petitions filed prior to and after April 30, 2015, Warner Chilcott has “adequately demonstrated” that it is similarly situated to the original waiver recipients.<sup>23</sup> It is also, therefore, “deserving of a limited retroactive waiver for fax ads sent with recipients’ prior express consent or permission sent prior to April 30, 2015.”<sup>24</sup>

Contrary to Plaintiffs’ assertion, the existence of good cause and demonstration that it is “similarly situated” is a “sufficient,” and the only necessary, basis for granting Warner Chilcott the requested waiver. As explained above, the Bureau has explicitly stated that the time of filing a petition not a relevant to the determination of whether a party is “similarly situated” to the original waiver recipients and, therefore, may obtain a waiver for faxes sent before April 30, 2015.<sup>25</sup> For this reason, the Commission and Bureau have never required any party to justify its failure to file before April 30, 2015 or to demonstrate that it made “every effort” to file by this date.<sup>26</sup> Indeed, the Bureau has never relied on such explanations, even where voluntarily provided, as a basis for granting a waiver.<sup>27</sup> Where such explanations were provided, the petitions were granted because the parties were similarly situated to the other waiver recipients.<sup>28</sup> This same critical requirement is met for Warner Chilcott, such that it is equally deserving of a waiver.

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at ¶ 13, n. 55.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *See id.* at ¶ 18. Indeed, because April 30, 2015 was not a filing “deadline,” the standard cited by Plaintiffs as articulated in *In re Atlanta Channel, Inc.* is inapplicable. *See* TCPA Plaintiffs’ Comments at p. 11.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

Notwithstanding the Bureau’s express finding that the time of filing is *not* a basis for denying a request to waive the Regulation, Plaintiffs have not demonstrated any delay on the part of Warner Chilcott. As Plaintiffs readily admit, Warner Chilcott was not even confronted with the subject lawsuit until November 10, 2015—more than six months after the April 30, 2015 compliance date.<sup>29</sup> A five month period to resolve pleadings, complete an internal investigation and conduct discovery prior to expending resources necessary to the instant petition is reasonable and not any indication of delay or lack of diligence on the part of this Petitioner.<sup>30</sup>

Plaintiffs’ suggestion that the Bureau should deny the instant petition on grounds that “the Commission will be entertaining opt-out waiver requests for many years in the future when the relief was designed to be temporary” demonstrates a fundamental misunderstanding of the Commission’s order. Initially, the relief is “temporary” insofar as the waivers apply, only, to faxes sent after the Junk Fax Order and before April 30, 2015 and not to faxes sent before or after that time period.<sup>31</sup> “Temporary” does not apply to petitioners’ right to seek a waiver for faxes sent within that timeframe.<sup>32</sup> Moreover, Plaintiffs’ professed fear that such petitions will continue for “many years into the future” is unfounded given the four-year statute of limitations applicable to claims under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.*<sup>33</sup>

In short, Warner Chilcott’s Petition was timely filed and Plaintiffs’ arguments should be disregarded. Not only did the Commission never set a deadline, the Bureau has expressly

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<sup>29</sup> TCPA Plaintiffs’ Comments at p. 7.

<sup>30</sup> Indeed, at least one petition filed after April 30, 2015 has been granted despite the fact that the petitioner had been involved in TCPA litigation long before that date. *See e.g.*, Petition of SourceMedia LLC for Retroactive Waiver, CG Docket Nos. 2-278, 05-338 at 3 (filed Sep. 21, 2015)(complaint filed on October 23, 2014).

<sup>31</sup> Original Waiver Order at ¶¶ 22-29.

<sup>32</sup> Third Waiver Order at ¶ 20; *see also* Second Waiver Order at ¶ 20.

<sup>33</sup> *Giovanniello v. ALM Media, LLC*, 726 F.3d 106, 115 (2d Cir. 2013), *ref.* 28 U.S.C. § 1658(a).

“decline[d] to reject petitions solely on the basis that they were filed after April 30, 2015.”<sup>34</sup>

Warner Chilcott meets the sole requirements for waiving the Regulation: it is similarly situated to the original parties, good cause exists for waiver and the subject faxes were sent prior to April 30, 2015. Therefore, its request for a retroactive waiver of the Regulation should be granted.

#### **IV. CONCLUSION.**

For all of these reasons, Petitioner, Warner Chilcott Corporation, respectfully requests that the Commission grant it the same retroactive waiver of Section 64.1200(a)(4)(iv) granted to the parties in the October 30, 2014 Waiver Order for any solicited faxes sent after the effective date of the Regulation through April 30, 2015. Alternatively, as set forth in its Petition, Warner Chilcott Corporation respectfully requests that the Commission issue a declaratory ruling, clarifying: (1) that Section 64.1200(a)(4)(iv) of the Commission's rules applies only to unsolicited fax advertisements; and/or (2) that Section 227(b) of the TCPA is not the statutory basis for Section 64.1200(a)(4)(iv) of the Commission's rules.

Respectfully submitted,

By: /s/ Erin A. Walsh

SmithAmundsen LLC  
150 North Michigan Avenue, Suite 3300  
Chicago, Illinois 60601  
(312) 894-3200 (ph)  
(312) 894-3210 (f)

*Counsel for Warner Chilcott Corporation*

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<sup>34</sup> Third Waiver Order at ¶ 18.